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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
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Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	MB Docket No. 05-255
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COMMENTS

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I. INTRODUCTION AND SUMMARY

BellSouth Corporation and its affiliated multichannel video programming distributor ("MVPD"), BellSouth Entertainment, LLC ("BEI") (hereinafter referred to collectively as "BellSouth"), hereby file their comments in response to the Commission's *Notice of Inquiry.*[1]

As the *Notice of Inquiry* correctly notes, the video programming market continues to be dominated by cable operators.[2] As a result, customers of video programming delivered via cable routinely experience significant price increases that outpace the rate of inflation.[3] These market conditions – cable dominance and hefty price increases for video services – are unlikely to change so long as obstacles remain in place that frustrate the ability of new entrants to compete fully and fairly against incumbent cable operators. In BellSouth's experience, and as described in greater detail below, the local franchising process and challenges to accessing video programming are the most serious obstacles to achieving the effective video competition that Congress intended when it enacted the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[4]

Because BellSouth has been in the video programming market for years, its efforts to compete against incumbent cable operators are especially instructive. BellSouth currently holds 20 franchises to provide cable "overbuild" service in local markets throughout its telephone

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[1] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* MB Docket No. 05-255, Notice of Inquiry (August 12, 2005) (*"Notice of Inquiry"*).

[2] *Id.,* ¶ 43 (noting that "cable operators continue to serve more than 70 percent of all MVPD subscribers").

[3] *Id.,* ¶ 7 (noting that the average monthly cable rate paid by subscribers increased by 7.4% in 2004, compared with a 2.1% change in the Consumer Price Index during the same period).

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

service area, representing approximately 1.4 million potential cable households. BellSouth provides cable overbuild service to approximately 40,000 customers in the following 14 markets: City of Vestavia Hills, Alabama; City of Chamblee, Cherokee County, Cobb County, DeKalb County, City of Duluth, Gwinnett County, City of Lawrenceville, City of Roswell, and City of Woodstock, Georgia; and St. Johns County, Miami-Dade County, City of Pembroke Pines and Town of Davie, Florida.

In addition, BellSouth has a strategic marketing alliance with DIRECTV, Inc. to offer DIRECTV digital satellite television service to BellSouth residential customers. As a result of this alliance, approximately 400,000 BellSouth customers have added DIRECTV service to their communication packages.

At the same time, BellSouth is exploring the feasibility of Internet Protocol Video, or IPTV as it is commonly called, which is an exciting new interactive technology used to enhance the delivery of television entertainment. Unlike traditional cable service, IPTV uses advanced Internet technologies to offer consumers a complete suite of interactive entertainment, data and voice services over a next generation broadband network. As part of its ongoing next generation broadband network development, BellSouth is actively testing IPTV as a competitive multimedia platform for delivering competitive video services in conjunction with the company's voice and data services.[5]

[5] BellSouth is working with Microsoft and multiple network vendors to evaluate IPTV over its next generation broadband network. Technical field trials are currently underway, and it is likely that a full service IPTV market trial will begin by early next year. While BellSouth is still in the evaluation and testing stages of IPTV, preliminary assessments are very promising for this multimedia broadband service. Although BellSouth has not made any decisions at this time regarding a commercial launch of IPTV, any decision to proceed will depend on the results of

IPTV holds considerable promise as an innovative vehicle to provide effective wire-based competition in the video programming market and thereby counter the dominance of incumbent cable operators.[6] However, BellSouth's ability to compete successfully with an IPTV offering hinges in large measure upon the removal of the two most significant impediments facing new entrants – the local franchising process and access to video programming.

II. DISCUSSION

A. The Local Franchising Process Is An Impediment To Competitive Entry In the Video Programming Market.

In response to the Commission's request for comments about whether competitive entry into the video market is impeded,[7] there can be no doubt that the local franchising process constitutes such an impediment. This is evident from BellSouth's experience with the 20 cable franchises it has negotiated to date.

On average, the length of time required to negotiate the cable franchises currently held by BellSouth was approximately 11 months. In other words, it took BellSouth nearly one year, on average, to obtain a local cable franchise, and in some cases, such as in Gwinnett County and Cobb County, Georgia, the franchise negotiation process took almost three years to conclude.[8]

Such delay can be fatal to a new entrant's ability to compete against an entrenched incumbent and could likely doom the success of any IPTV service that BellSouth may choose to

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continued testing and trials, a full assessment of the business opportunity of IPTV, and getting the right regulatory structure in place.

[6] *Notice of Inquiry*, ¶ 43 (noting that the "GAO reports that the existence of a wire-based competitor has a measurable downward impact on the average monthly cable rate ...").

[7] *Id.*, ¶ 54.

[8] Declaration of Thompson (Tom) T. Rawls II, ¶¶ 3-4, Exhibit A (hereinafter referred to as "*Rawls Declaration*").

offer.[9] In particular, BellSouth has identified the 40 top markets in its region in which to offer IPTV service. If BellSouth were required to obtain a cable franchise in order to serve these markets, BellSouth estimates that it would have to negotiate franchise agreements with almost 400 local franchising authorities. With each franchise requiring an average of one year to conclude, the strain on BellSouth's ability to compete would be significant, to say nothing of the substantial resources it would be required to devote to the negotiation process before BellSouth could even enter the market.

The local cable franchising process is administratively cumbersome, slow, costly, and fraught with numerous local political perils and litigation risks. This is particularly true for, but certainly not limited to, states that have adopted at the behest of incumbent cable providers so-called "level playing field" statutes.[10] BellSouth provides traditional local telephone service in two states that have adopted such statutes – Florida and Tennessee.[11] In a nut shell, "level playing field" statutes prohibit local governments from granting a cable franchise to a competitive cable service provider that "is more favorable or less burdensome" than the incumbent's cable franchise. Although undoubtedly well intended from the state legislator's point of view, these statutes frequently operate or are used by the incumbent cable operator, as highlighted below, as intentional barriers to competitive entry. Significantly, and not by accident

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[9] Since it is an interactive service, rather than a traditional cable service, BellSouth strongly believes that IPTV should not be subject to current Title VI cable laws and regulations. However, until there is regulatory clarity and a decision is made to move forward with an IPTV offering, BellSouth will continue to work with local municipalities that are interested in fostering a competitive video market and services like IPTV. To create that regulatory clarity, BellSouth supports federal legislation that would provide a more competitive video service environment and consistency across states and municipalities.

[10] *Rawls Declaration* ¶ 5.

[11] Fla. Stat. § 166.046; Tenn. Code Ann. § 7-59-203.

considering their source, these statutes protect only incumbent cable operators and do not prohibit local franchising authorities from imposing conditions on new video competitors that are "more burdensome or less favorable" than the incumbent's franchise.[12]

In all fairness, it is difficult to appreciate how cumbersome, slow, and inappropriate the local franchising process is in today's communications market. Nevertheless, the following examples underscore the extent to which the local franchising process constitutes an impediment to competitive entry in the video service market.

1. The City of Germantown, Tennessee.

In 1996 BellSouth filed applications for authority to provide cable services in Shelby County, Tennessee (a suburb of Memphis) and in the two largest cities located within the Shelby County boundaries - Bartlett and Germantown. BellSouth was successful in getting a cable franchise to serve the City of Bartlett in record time (only 3.5 months). However, after 5 months of negotiating with officials and the consultant firm representing Germantown, BellSouth reached an impasse with Germantown officials who insisted that BellSouth agree to overbuild all of Germantown and the geographic area served by the incumbent operator in 5 years.

The overbuild requirement was insisted upon by Time Warner, the incumbent cable operator, which persuaded Germantown officials that it would be a violation of Tennessee's "level playing field" statute not to impose this build-out requirement on BellSouth.

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[12] *Rawls Declaration* ¶ 6. In addition to "level playing field" statutes, many cable operators have succeeded during franchise renewal proceedings in persuading local franchising authorities to adopt "level playing field" cable ordinances that accomplish the same result. Interestingly, the average time required for BellSouth to negotiate a cable franchise in Florida, a "level playing field" statute state, was approximately 12 months, as compared with approximately 10 months that it took BellSouth to obtain a cable franchise in Georgia, a non-level playing field statute state. *Id.*, ¶¶ 4 & 7.

Notwithstanding BellSouth's legal arguments to the contrary, the City sided with Time Warner, and BellSouth had no choice but to withdraw its application.

Since Germantown represented a significant percentage of the contiguous land area and population of Shelby County and constituted an important component of the economics supporting BellSouth's business plan to build a video head-end by which to offer competitive video services in the area, BellSouth subsequently withdrew its Shelby County application and never activated the Bartlett franchise. To the best of BellSouth's information and belief, the citizens of those communities are still without a choice of competitive cable service providers.[13]

2. The City of Coral Springs, Florida.

In the summer of 1996, BellSouth, acting through its cable affiliate BEI, filed an application for a cable franchise to serve the City of Coral Springs, Florida, a community located in South Eastern Florida. The City hired a consultant to assist in the negotiations. After conducting a field investigation of the BellSouth's local telephone service affiliate's (BellSouth Telecommunications, Inc. or "BST") construction in the area, the City's consultant issued a report to the City, concluding that "BellSouth is installing a video distribution system which can readily be used as a cable television distribution system simply by feeding the system with the appropriate electronic circuitry."

The City subsequently challenged the legal right of BST to construct communications facilities capable of supporting video broadband services in the public rights-of-way under its state-wide franchise without BellSouth first obtaining a cable franchise. Furthermore, the consultant proposed a number of unreasonable cable franchise requirements that it recommended be imposed on BEI that would result in placing "more burdensome and less favorable" franchise

[13] *Rawls Declaration* ¶¶ 9-11.

requirements on BellSouth to which the incumbent cable operator is not subject. Given the relatively high cost and economic risk of entering the wireline video marketplace as a second or third entrant, BEI elected to withdraw its City of Coral Springs cable franchise application.[14]

3. Miami-Dade County, Florida.

In the summer of 1996, BEI filed an application for local franchise authority to provide cable services in the Miami-Dade County area. Miami-Dade County is the single largest local franchising authority in the State of Florida by total population (in excess of 2 million people) and households (just under 1 million). At the time of BEI's application, there were 7 incumbent cable operators serving the Miami-Dade County area, none of which competed against each other in any material way.

Four of the incumbent cable operators filed extensive written objections to BEI's franchise application, including raising various objections under the state's "level playing field" statute. After several months of negotiations with representatives of Miami-Dade County, BEI filed extensive amendments to its franchise application and sought an amendment to the local cable ordinance that would eliminate the 5-year build-out requirement and allow any cable operator, including all 7 of the incumbent operators, to enter the service territory of any other cable operator in the local franchising authority's jurisdiction to provide a competitive cable service without a build-out requirement. Nine months after filing its application, Miami-Dade County adopted the amendment, eliminating the build-out requirement and granting BEI a cable franchise over the strenuous legal and business objections of the incumbent cable operators.

The objections of the incumbent operators were too numerous to list here, but suffice it to say that they centered primarily on claims that: (1) removal of the build-out requirement violated

[14] *Rawls Declaration* ¶¶ 12-13.

Florida's "level playing field" statute; (2) without a mandatory build-out requirement, BEI would engage in "cherry picking" and "red-lining" (notwithstanding BellSouth's agreement not to engage in red-lining); and (3) the local franchising authority not grant BEI's franchise until it conducted a comprehensive study to determine whether having BellSouth construct video capable facilities in the public rights-of-way would be adverse to the public interest and endanger the public safety and convenience by placing too great of a burden on public rights-of-way and utility poles.

Efforts by incumbent operators to oppose BellSouth's entry into the video market in Miami-Dade County did not end with the grant of the cable franchise. After BEI's cable franchise was approved on April 15, 1997, the seven incumbent cable operators filed suit against Miami-Dade County in both state and federal court seeking a declaratory ruling that the grant violated the local cable ordinance and state law and seeking injunctive relief blocking BEI from providing service. BEI was joined as a party defendant in both actions.

After nine months and substantial attorney fees, the state court entered summary judgment in favor of Miami-Dade County and BEI. The following month, the United States District Court for the Southern District of Florida dismissed the federal action on grounds that the final state court action constituted of plaintiff's claims, basically concluding that the defendants had been sued in two separate lawsuits for the same claims and that they only had to win once. Not surprisingly, the incumbent cable operators appealed both decisions, and equally unsurprising, both decisions were affirmed on appeal.[15]

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[15] *Rawls Declaration* ¶¶ 14-19; *see ACP Holdings, Inc., v. Metropolitan Dade County*, Case No. 97-10915 (11th Cir. Ct., Fla.) (Feb. 25, 1998); *aff'd* 3rd District Court of Appeals of Florida (June 2, 1999); and U.S. District Court for the Southern District of Florida, Case No. 97-1567-CIV-Graham (July 13, 1998), *aff'd* Case 98-5548 (11th Cir. June 7, 1999).

4. DeKalb County, Georgia.

On June 24, 1996, BEI filed an application for a local cable franchise to provide cable services in DeKalb County, Georgia. The two incumbent cable operators in DeKalb County -- Scripps Howard and Media One – opposed BEI's entry into the market: (1) requesting that the County impose a 5-year build-out requirement for BEI's entire service area; (2) raising concerns about "cherry picking" by BEI; (3) seeking an investigation whether granting BEI a cable franchise would constitute a violation of the federal MMDS cross-ownership restriction set forth in 47 U.S.C. § 533 given that one of BEI's affiliates (BellSouth Wireless Cable, Inc.) had an MMDS spectrum license covering the same area; and (4) arguing that the County ensure a level playing field and not grant a franchise more favorable or less burdensome than the incumbents' franchises. To its credit, the County rejected these objections, and the franchise was granted relatively quickly after 5 months of intensive negotiations with county staff and an outside legal consultant.

However, even when a franchise is granted relatively quickly, the local franchising process has adverse competitive consequences, as the DeKalb County franchise illustrates. BEI found itself in a peculiar situation in DeKalb. BEI had initially planned to conduct a video dial-tone service trial in DeKalb County and had already constructed video capable transmission facilities passing approximately 4,000 homes in DeKalb and an additional 3,000 homes in a contiguous portion of the City of Chamblee. Before it was in a position to start the video dial-tone trial, however, the Telecommunications Act of 1996 ("1996 Act") was enacted, allowing BEI to provide video entertainment services under a cable franchise model.

Because BEI had already made the investment and built the facilities which it could not use to provide competitive video entertainment services without a cable franchise, BEI had no choice but to agree to some of the most onerous franchise terms, including:

- a relatively modest but nonetheless mandatory and non-market driven build-out requirement to ensure that it would deploy facilities and services to several thousand additional homes that were not in BEI's original video service plan but located in a politically sensitive area deemed necessary to win approval of the franchise;

- an annual per subscriber PEG capital facilities and equipment support payment (ranging from approximately $4.50 to $2.50 per subscriber per year) over and above the 5% local cable franchise fee;

- an Institutional Network (I-Net) support payment equal to BEI's pro rata per subscriber share of the incumbent cable operator's cost of providing I-Net facilities to the County, based on a maximum total I-Net cost of $2,000,000, also in addition to the 5% franchise fee;

- up to 10% of BEI's spare conduit capacity for County use; and

- a laundry list of miscellaneous operational, facility and customer service requirements.

If one adds just the above referenced PEG capital and I-Net payments to the 5% franchise fee obligation, the total fees paid by BEI to the County are substantial. Such fees inarguably undermine a new entrant's ability to compete successfully against incumbent cable operators.[16]

5. St. Johns County, Florida.

Negotiating the St. Johns County, Florida franchise was a two-step process. The initial cable franchise was granted under the rural exemption to the pre-1996 Telecommunications Act cross-ownership restriction that prohibited telephone companies and their affiliates from providing cable services where they also provided local telephone services. The initial franchise only granted authority to provide cable services within a relatively small area of the county

[16] *Rawls Declaration* ¶¶ 20-24.

containing a new development called World Golf Village. On December 10, 1996, before the development was completed or service was activated and following enactment of the 1996 Act which removed the cross-ownership restriction, BEI filed an amended application seeking authority to extend its cable franchise authorization to include all of the adjacent area served by the incumbent cable operator, Continental Cablevision ("Continental").

Continental vigorously apposed BEI's franchise application to compete in Continental's service area. Attorneys representing Cablevision filed a number of written objections to BEI's application. BEI's application also was opposed by Time Warner, the incumbent cable operator serving the City of St. Augustine, Florida, which is also located within St. John's County. Even though BEI was not seeking authority to provide service in Time Warner's franchise area, Time Warner claimed that granting the franchise would give BellSouth the right to "cherry-pick" and that BEI should be required to meet the same five-year build-out and line extension requirements contained in Time Warner's cable franchise.

One year after the application seeking authority to extend the existing franchise service area was filed and after numerous amendments to BEI's application and adoption of extensive amendments to the local cable ordinance, BEI's amended franchise was finally approved.[17]

These examples highlight some of the specific difficulties encountered by BellSouth with the local cable franchising process. By no means are these experiences limited to BellSouth, nor do they represent an exhaustive list of the many political, legal, operational and business hurdles associated with obtaining and operating under local cable franchises, nor do they represent all of the franchise applications that were subject to difficulties or significant delays. Furthermore, this brief discussion cannot adequately convey the numerous meetings and negotiations that take

[17] *Rawls Declaration* ¶¶ 24-27.

place with local professional staff and public officials, attendance at public hearings and the detailed cable ordinance application procedures that are inherent in the local franchising process.

No matter how well-intentioned a local franchising authority may be, the current process is inherently unsuitable to facilitating competitive entry. It is costly, time-consuming, and susceptible to abuse by a variety of parties, but especially by incumbent cable operators which have every incentive to use all measures to delay or burden new entrants through regulatory gamesmanship. If BellSouth and all other wireline competitors are required to go through this process with hundreds and possibly even thousands of local franchising authorities in order to provide competitive video services over broadband transmission facilities, market entry will be seriously impeded. Only incumbent cable operators stand to benefit from such an outcome, while consumers who desperately want and deserve another choice of video providers will undoubtedly suffer.[18]

B. New Entrants Must Have Access To Video Programming In Order To Ensure Competitive Choice.

Multichannel video is the "core" service offered by BellSouth's wired cable systems in all of BellSouth's markets and will form the basis for any IPTV service BellSouth may offer. Thus, program access and discriminatory programming terms and conditions that directly affect alternative MVPDs continue to be of paramount importance to BellSouth and its customers.

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[18] Proponents of the local franchising process often insist that the local franchises are necessary to impose and enforce build-out requirements, the absence of which, they claim, will lead to "red-lining." The term "redlining" refers to the practice of denying or increasing the cost of service to residents of certain areas based upon such criteria as race or socioeconomic status. The term originated in the 1930s when banks would actually mark red lines on a map in order to delineate areas to which they did not want to lend because of the race of the residents. *See http://en.wikipedia.org/wiki/redlining.* Notwithstanding such rhetoric, few of the 14 cable franchises under which BellSouth currently operates contain a build-out requirement, and yet BellSouth has not been the subject of a single "red-lining" complaint in almost a decade of operation. *Rawls Declaration* ¶ 30.

The Commission has long recognized that concentration of ownership among cable operators is significant in the program access context because it strengthens the buying power of the major cable multiple system operators ("MSOs") and enhances their ability to coordinate their conduct.[19] Thus, it is critical to note that consolidation within the cable industry has continued nearly unabated, as illustrated by Time Warner's and Comcast's efforts to acquire Adelphia's cable operations.[20]

Equally significant is the continuing trend towards "clustering" of cable television systems, a process which only tightens the cable MSOs' stranglehold over distribution of video programming in local markets. The Commission's most recent report noted that, while the number of clusters decreased slightly between 2002 and 2003, primarily because of merger activity, the number of subscribers in these clusters increased from approximately 51 million subscribers at the end of 2002 to approximately 53.6 million subscribers at the end of 2003.[21]

These marketplace developments continue to have a substantial negative impact on the willingness of programmers to sell their product to cable's competitors. A programming service

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[19] *See, e.g., In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems*, CS Docket No. 96-46, *Second Report and Order,* 11 FCC Rcd 18223 (1996). *See also In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming ("1998 Annual Report")*, CS Docket No. 98-102, *Fifth Annual Report,* 13 FCC Rcd 24284, 24362 ¶125 (1998) ("Although cable operators usually do not compete to serve the same subscribers in local downtown markets, they may have an incentive to coordinate their decisions in the upstream market for the purchase of programming on a national or regional level. Concentration of ownership among buyers in this market is one indicator of the likelihood that coordinated behavior among buyers will be successful").

[20] *In the Matter of Joint Applications for Consent to the Assignment and/or Transfer of Control of various Commission licenses filed by Adelphia Communications, Time Warner, and Comcast Corporation*, MB Docket No. 05-192 (filed May 18, 2005).

[21] *2004 Annual Report*, ¶142.

has no chance of success without access to a critical mass of subscribers and, therefore, programmers are becoming even more beholden to the large MSOs as MSOs tighten their control over distribution on a national and regional scale.

The need for critical mass is also true of the television networks, which are entirely dependent on cable MSOs for carriage of network-affiliated cable programming services (*e.g.*, MSNBC, CNBC, Fox News, FX, ESPN/ESPN2) and, ultimately, digital television ("DTV") signals. Whereas television broadcast networks once had opportunities to license their programming to multiple cable operators in a region, clustering has increasingly forced them to deal with a single cable operator who controls a majority of the market's subscribers.[22]

Moreover, clustering facilitates expanded linkage of cable television systems via fiber, which in turn provides cable programmers with unprecedented opportunities to evade their program access obligations by migrating programming from satellite to fiber delivery. This trend will only be accelerated if Time Warner and Comcast successfully acquire Adelphia's cable operations, and the resulting migration of programming to Time Warner's and Comcast's extensive fiber networks. As the Commission has noted, "terrestrial migration may in the future impact the ability of alternative MVPDs to compete in the video marketplace."[23] In terms of this being a real problem for new entrants, the "future" has arrived.

In addition, the rapid consolidation of the cable industry will only further aggravate the competitive imbalance created by the steep volume discounts which cable programmers offer exclusively to large MSOs. While such discounts might represent a legitimate business strategy

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[22] *See 2004 Annual Report* ¶ 157, n.698 (noting the market shares for the dominant cable operators in nine DMAs, ranging from 71 percent in Raleigh/Durham (Time Warner) to 90 percent in Las Vegas (Cox)).

in a fully competitive market, in the present environment they are available only to cable MSOs that do not compete with each other. Moreover, under the current program access law, such discounts do not have to be entirely cost-justified, and may instead be justified on the basis of undefined "direct and legitimate economic benefits." BellSouth's experience in the marketplace also confirms that *non*vertically integrated cable networks have the same economic incentives to placate cable MSOs by granting them steep anticompetitive volume discounts. It is clear that any programming service, including a *non*vertically integrated cable network, needs access to a critical mass of subscribers to have a chance of success. As a result, incumbent cable operators, particularly now with their clustered systems, are able to demand discounts and other favorable terms from programmers desperate to achieve the "number of eyeballs" necessary for the successful launch of a new channel.

The Commission's *2004 Annual Report* finds that only 23 percent of the programming networks in operation today are "vertically integrated" and, therefore, are covered by the program access law.[24] This reaffirms what alternative MVPDs have known for some time, *i.e.*, that the statute's vertical integration requirement has become outdated and no longer serves its original objective of ensuring that cable's competitors are afforded nondiscriminatory access to programming.

The Commission has observed in the program access context that Congress, through the 1992 Cable Act, intended to "rely on the marketplace, to the maximum extent possible, to achieve the availability of a diversity of views and information through cable television and other

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[23] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* CS Docket No. 99-230, *Sixth Annual Report,* 15 FCC Rcd 978, 1065 ¶202 (citing 1998 Annual Report, 13 FCC Rcd 15822, 15856-7 (1998) ¶71).

[24] *2004 Report* ¶ 145.

video distribution media."[25] BellSouth agrees that, in a fully competitive environment, the marketplace is the best regulator of private business transactions between alternative MVPDs and program suppliers. However, absent more robust competition, the marketplace cannot be relied upon to discourage cable incumbents and cable programmers from discriminating against new entrants. It is for this very reason that Congress charged the Commission with the responsibility of adopting and enforcing program access rules to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers."[26]

It is time for the Commission to act. It has recognized in its reports over the last several years the existence of factors that, if left unchecked, will undermine competition for the delivery of video programming. As companies such as BellSouth make plans to offer IPTV, which would be a wireline video alternative to traditional cable service, the Commission must take action to ensure full and fair access to video programming.

Respectfully submitted,

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[25] *In the Matter of EchoStar Communications Corporation v. Fox/Liberty Networks LLC, et. al.*, DA 99-1271, *Order on Reconsideration*, 14 FCC Rcd 10480, 10486 ¶15 (1999).

[26] 1992 Cable Act § 2(b)(5), 106 Stat. 1463.

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In the Matter of	)	
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Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in Markets for the Delivery	)	
of Video Programming	)	

DECLARATION OF THOMPSON (TOM) T. RAWLS II

Being of lawful age, and duly sworn upon oath, I do hereby depose and state:

1. My name is Thompson (Tom) T. Rawls II, and I am currently employed by BellSouth Corporation ("BellSouth") as Chief Counsel - Internet, Broadband & Video. I have been employed in my current position since the spring of 2001. Prior to that, I served from 1995 to 2001 as General Counsel to BellSouth's video services affiliate BellSouth Interactive Media Services, Inc., the predecessor in interest to BellSouth Entertainment, LLC (collectively referred to herein as "BEI"), which is BellSouth's current video services affiliate. This declaration is being filed in support of BellSouth's comments filed in the Federal Communication Commission's Notice of Inquiry for its Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Dkt No. 05-255).

2. Shortly after the Telecommunications Act of 1996 ("1996 Act") was passed by Congress, BellSouth, acting through its video affiliate BEI filed numerous franchise applications for authorization to provide cable services in dozens of local communities, primarily in

certain parts of Florida, Atlanta Georgia and Memphis, Tennessee. During the time period from 1995 to 2001, I was responsible for overseeing all legal work provided in support of BEI, including legal work and advice provided in connection with processing its cable franchise applications. The facts set forth in this statement are true and correct to the best of my information and belief, and are based on my personal knowledge and direct involvement in those events as well as documents and records in related company files that remain under my custody and control.

3. Attached as Exhibit A is a matrix outlining the 20 communities in which BellSouth has obtained a local cable franchise. BEI is currently providing competitive cable services under those authorizations to approximately 40,000 subscribers in 14 of those communities.

4. Exhibit A includes the date BellSouth filed its application to the Local Franchise Authority ("LFAs") to provide cable services and the date that application was granted. As Exhibit A reflects, on average it took BellSouth 11 months to negotiate a successful local cable franchise. Interestingly, it shows that it took BellSouth 1.5 months longer on average (i.e., 12 months) to negotiate a cable franchise in Florida, a "level playing field statute" state, than to negotiate a cable franchise in Georgia (i.e., 10.5 months), a non-level playing field statute state. Of this sampling, the shortest time required for BellSouth to obtain a franchise from the time it filed its initial application request was 1.5 months for the small town of Woodstock, Georgia, while a few took up to 2 or more years.

5. The local cable franchising process is administratively cumbersome, slow, costly, and fraught with numerous local political perils and litigation risks. This is particularly true for but certainly not limited to states that have adopted at the behest of the incumbent cable industry lobby so called "Level Playing Field Statutes" (LPFS). BellSouth provides traditional local telephone service in two states (Florida and Tennessee) that have adopted LPFS.

6. In a nut shell, LPFS prohibit local governments from granting a cable franchise to a competitive cable service provider that "is more favorable or less burdensome" than the incumbent's cable franchise. Although undoubtedly well intended from the state legislator's point of view, these statutes frequently operate or are used by the incumbent cable operator, as highlighted below, as barriers to competitive entry. Significantly, and not by accident considering their source, these statutes only protect incumbent cable operators and do not prohibit a LFA from imposing conditions on new video competitors that are "more burdensome or less favorable" than the incumbent cable operator's franchise.

7. In addition to LPFS, many cable operators have succeeded during franchise renewal proceedings in persuading LFAs to adopt quasi-LPFS cable ordinances that mirror these state statutes where they have been unsuccessful in persuading state legislatures to adopt such restrictions. Thus, the adverse effects of these restrictions on video competition are by no means limited to LPFS states.

8. In all fairness, one needs to live through a local cable franchise proceeding to truly appreciate how difficult, frustratingly slow and inappropriate the process is for today's new broadband competitive service environment. However, since most policy makers at both the federal and state level have had little or no opportunity to experience the local cable franchising process first hand, I have set forth below a summary description of a few of BellSouth's experiences from which policy makers are free to draw their own conclusions.

The City of Germantown, Tennessee

9. In 1996, BellSouth filed applications for authority to provide cable services in Shelby County Tennessee (a suburb of Memphis) and in the two largest cities located within the Shelby County boundaries- Bartlett and Germantown. BellSouth was successful in getting a cable franchise to serve the City of Bartlett in record time (only 3.5 months). However, after 5 months of negotiating with officials and the consultant firm representing Germantown, BellSouth reached an impasse with Germantown officials who insisted that BellSouth agree to overbuild all of Germantown and the incumbent operator in 5 years.

10. On March 18, 1997, an attorney representing Time Warner, the incumbent cable operator, sent a letter to Germantown officials, claiming that it would be a violation of the LPFS not to impose this build-out requirement on BellSouth. Notwithstanding BellSouth's legal arguments to the contrary, the City sided with Time Warner, and BellSouth was forced to withdraw its application. The month after BellSouth withdrew its application,

Germantown and Time Warner reached a tentative renewal agreement of the incumbent's cable franchise after 2 ½ years of negotiations.

11. Since Germantown represented a significant percentage of the contiguous land area and population of Shelby County and the economics supporting BellSouth's business plan to build a video headend and offer competitive video services in the area, BellSouth elected to withdraw its Shelby County application and never activated the Bartlett franchise. To the best of BellSouth's information and belief, the citizens of those communities are still without a choice of competitive cable service providers.

The City of Coral Springs, Florida

12. In the summer of 1996, BellSouth, acting through its cable affiliate BEI, filed an application for a cable franchise to serve the City of Coral Springs, Florida, a community located in South Eastern Florida. The City hired a consultant to assist it in negotiations. After conducting a field investigation of the BellSouth's local telephone service affiliate's (BellSouth Telecommunications, Inc. or "BST") construction in the area, the City's consultant issued a report to the City concluding that "BellSouth is installing a video distribution system which can readily be used as a cable television distribution system simply by feeding the system with the appropriate electronic circuitry."

13. This quickly led to an argument between BST and the City as to the legal right of BST to construct video broadband capable communications facilities in the public rights-of-way under its local telephone rights prior to obtaining a cable franchise. Furthermore, the

consultant followed that up with a draft proposal to impose a number of unreasonable cable franchise requirements on BEI that would result in placing "more burdensome and less favorable" franchise requirements on BellSouth than the incumbent cable operator, a proposal that was not prohibited by the anti-competitive LPFS. Given the relatively high cost and economic risk of entering the wireline video marketplace, BEI elected to withdraw its City of Coral Springs cable franchise application and devote its resources to other opportunities in the South Florida area.

Miami-Dade County, Florida

14. In the summer of 1996, BEI filed an application for local franchise authority to provide cable services in the Miami-Dade County area. Miami-Dade County still is and was at the time by total population (in excess of 2 million) and households (approximately 1 million) the largest single LFA in the state of Florida. At the time of BEI's application, there were 7 incumbent cable operators serving the Miami-Dade County area, none of which competed with each other in any material way.

15. Four of the incumbent cable operators filed extensive written objections to BEI's franchise application, including numerous LPFS objections. After a few months of good faith and cooperative discussions with the LFA's professional staff, BEI filed extensive amendments to its franchise application and sought an amendment to the local cable ordinance that would eliminate the 5 year build-out requirement and allow any cable operator, including all 7 of the incumbent operators, to enter the service territory of any other cable operator in the LFA's jurisdiction to provide a competitive cable service

without a build-out requirement. Nine months after filing its application, the LFA adopted an amendment eliminating the build-out requirement and granted BEI a cable franchise over the strenuous legal and business objections of the incumbent cable operators.

16. The objections of the incumbent operators were too numerous to list here, but suffice it to say that they primarily centered on claims that removal of the build-out requirement violated the LPFS, that removing the build-out requirement would lead to "cherry picking" and "red-lining" (notwithstanding BellSouth's agreement not to engage in red-lining), and that the LFA should not grant BEI's franchise until it conducted a comprehensive study to determine whether having BellSouth construct video capable facilities in the public rights-of-way would be adverse to the public interest and endanger the public safety and convenience by placing too great of a burden on public rights-of-way and utility poles.

17. The Miami-Dade County local cable franchising "experience" did not end with the grant of the cable franchise. BEI's cable franchise was approved on April 15, 1997. In May of 1997, the 7 incumbent cable operators pooled their funds and sued Miami-Dade County in both state and federal court seeking a declaratory ruling that the grant violated the local cable ordinance and state law, including but not limited to the LPFS, and injunctive relief blocking BEI from providing service. BEI was joined as a party defendant in both actions.

18. Nine months and hundreds of thousands of dollars in attorney fees later, the state court entered summary judgment in favor of the Defendants Miami-Dade County and BellSouth. The following month, the US District Court for the Southern District of Florida dismissed the federal action on grounds that the final state court action constituted res judicata of the Plaintiffs' claims, basically concluding that the Defendants had been sued in two separate lawsuits for the same claims and that they only had to win once. Both rulings were appealed by the incumbent cable operators and both decisions were affirmed on appeal.

19. Approximately 3 years after it filed its application for authority to provide cable services, BEI was free to commence the provision of cable services in Miami-Dade County without the risk of its local franchise being declared void for violating the LPFS or for having been issued pursuant to an illegal action by the LFA.

DeKalb County, Georgia

20. On June 24, 1996, BellSouth filed an application for a local cable franchise to provide cable services in DeKalb County, Georgia. The franchise was granted relatively quickly after 5 months of intensive negotiations with the LFA staff and an outside legal consultant. However, the process was anything but smooth.

21. BellSouth found itself in a peculiar situation in DeKalb. BellSouth had initially planned to conduct a video dialtone service trial in DeKalb County and had already constructed video capable transmission facilities passing approximately 4,000 homes in DeKalb and

an additional 3,000 homes in a contiguous portion of the City of Chamblee. Before it was in a position to start the video dialtone trial, the 1996 Act was passed allowing BellSouth to provide video entertainment services under a different and superior model.

22. To make a long story short, BEI had already made the investment and built the facilities but couldn't use those facilities to provide competitive video entertainment services without a cable franchise. Consequently, BEI was required to agree to some of the most onerous franchise terms it has ever agreed to, including:

- a mandatory and non-market driven build-out requirement to ensure that it would deploy facilities and services to several thousand additional homes that were not in BEI's initial video service plan but located in a politically sensitive area deemed necessary to win approval of the franchise;
- an annual per subscriber PEG capital facilities and equipment support payment (ranging approximately $4.50 to $2.50/sub/yr over several years) in addition to the 5% local cable franchise fee;
- an Institutional Network (I-Net) support obligation equal to BEI's pro rata per subscriber share of the incumbent cable operator's cost of providing I-Net facilities to the County, based on a maximum total I-Net cost of $2,000,000, also in addition to the 5% franchise fee;
- an obligation to provide up to 10% of BEI's spare conduit capacity for County use; and
- a long list of special and miscellaneous operational, facility and customer service requirements.

23. The two incumbent cable operators (Scripps Howard and Media One) serving DeKalb County were not pleased with BEI's entry into the cable service business. Two days before the public hearing to approve BEI's franchise agreement, Scripps Howard's attorney sent a November 25, 1996 letter to the DeKalb County Commissioners (1) asking them to impose a 5 year buildout requirement for BEI's entire service area, (2) raising concerns about "cherry picking," (3) asking the Commission to investigate whether granting BEI a cable franchise would constitute a violation of the federal MMDS cross-ownership restriction set forth in 47 U.S.C. § 533 given that one of BEI's affiliates (BellSouth Wireless Cable, Inc.) had an MMDS spectrum license covering the same area, and (4) arguing that the Commission should ensure a level playing field and not grant a franchise more favorable or less burdensome than theirs to BellSouth. Much to the DeKalb County Commission's credit, the franchise was granted over these last minute objections.

St. Johns County, Florida

24. The St. Johns County, Florida franchise was a two step process. The initial cable franchise was granted under the rural exemption to the pre-1996 Act cross-ownership restriction that prohibited telephone companies and their affiliates from providing cable services where they also provided local telephone services. The initial franchise only granted authority to provide cable services within a relatively small area of the county containing a new development called World Golf Village. On December 10, 1996, before the development was completed or service was activated and following adoption of the 1996 Telecom Act removing the cross-ownership restriction, BEI filed an amended

application seeking authority to extend its cable franchise authorization to include all of the adjacent incumbent cable operator's (Continental Cablevision or "Continental") service area.

25. Continental vigorously apposed BEI's franchise application to extend its competitive video service into Continental's service area. Attorneys representing Continental filed a number of written objections to BEI's application which was essentially a "me-too" version of the previously granted franchise. Continental's (later acquired by MediaOne) main objection was that BEI's application and proposed franchise agreement would allow it to "cherry-pick" and did not satisfy the LPFS because it lacked build-out and density requirements, an objection that was overcome by amending the local cable ordinance to remove the build-out requirement for all cable operators. Continental "suggested" to the County Attorney that BEI's "overbuild" be required to be accomplished in 2 years for most if not all of the county.

26. BEI's application was also opposed by Time Warner, the incumbent cable operator which at the time served the City of St. Augustine, Florida, which is also located in St. John's County. Even though BEI was not asking for authority to provide service in Time Warner's franchise area, Time Warner claimed that granting the franchise would give BellSouth the right to "cherry-pick" and that the LPFS requires BEI to meet the same 5 year buildout and line extension requirements that were in the Time Warner cable franchise, an interesting argument inasmuch as there was no overlap in service areas.

27. One year after the application seeking authority to extend the existing franchise service area was filed and after numerous amendments to BEI's application and the adoption of extensive amendments to the local cable ordinance, including elimination of the build-out requirement for overlapping systems, BEI's amended franchise was approved.

28. The above examples highlight some of the more difficult encounters BellSouth experienced with the local cable franchising process. By no means do they represent an exhaustive list of the many political, legal, operational and business difficulties associated with obtaining and operating under local cable franchises, nor do they represent all of the franchise applications listed in Exhibit A that were difficult or significantly delayed in being approved. Furthermore, neither Exhibit A nor my Declaration can adequately convey the time devoted to the numerous meetings and negotiations that take place with local professional staff and public officials, attendance at public hearings and the detailed cable ordinance application procedures that must be followed as part of almost any franchise approval and cable ordinance amendment process.

29. It must be noted that the above examples represent 5 problem franchises in a very limited universe. If BellSouth and the other large local telecommunications companies are required to secure hundreds and possibly even thousands of additional cable franchises to provide their existing telephone service customers a competitive choice in video services over their existing but newly upgraded broadband transmission facilities, then one can

reasonably anticipate having to multiply these difficulties and delays many times over if the existing cable regulatory model is not changed and changed quickly.

30. With only a few minor exceptions, almost all of the 14 cable franchises under which BellSouth currently provides cable service have no facilities build-out requirement. Notwithstanding the cable industry's mantra that this will lead to "red-lining," in the eight or nine years BellSouth has been operating under these franchises, it has not had a single red-lining complaint. The simple truth is that build-out requirements are not needed to protect the public from red-lining.

31. The primary point I hope to demonstrate with the above examples is that the local cable franchising process is much too slow, inefficient, contentious, uncertain and subject to the vagaries of local politics to be used as an effective public policy tool to promote the benefits of video competition and increased investment in broadband communications systems in the United States. Local Franchising Authorities should not be determining via the franchising process the business terms, conditions or timing of the entry of new wireline competitors in cable service markets. Nor should local governments be determining who is entitled to enter those markets or the pace at which such competitors can or will invest in new broadband technologies that will bring American consumers an array of new multi-media services that do not exist today and a choice in service providers.

I declare that the foregoing is true and correct to the best of my knowledge.

Thompson T Rawls II

Thompson (Tom) T. Rawls II

Subscribed and sworn to before me

This 19th day of September 2005

Janice E Padgett

Notary Public

Notary Public, Gwinnett County, Georgia
My Commission Expires Feb. 19, 2008